FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD A. BATTERTON, SECRETARY, MARYLAND DEPARTMENT OF EMPLOYMENT AND SOCIAL SERVICES, *et al., Petitioners,*

v.

ROBERT FRANCIS, *et al., Respondents,*

AND

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *Respondent-Intervenor.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR RESPONDENT-INTERVENOR

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REPLY BRIEF FOR RESPONDENT-INTERVENOR

In its Brief, Respondent Robert Francis ("Francis") ignores relevant legislative policy in describing the AFDC-UF welfare program, misconceives the burden of persuasion with respect to demonstrating benefit entitlement under this program, and blurs the statutory distinction which distinguishes striking employees from persons wholly without a job.

Each of these arguments requires response so that the Court can properly review the important welfare eligibility and agency rule-making issues raised in the instant case.

ARGUMENT

1. Francis' basic argument is that because employees who voluntarily quit their job or are fired for cause are in fact "unemployed", federal and state regulations which authorize denial of unemployment welfare for "unemployed" persons are *ipso facto* invalid. Whatever this argument's persuasive impact for discharged and voluntary quit claimants, Francis, as did the District Court (Jt. App. p. 85a), concedes (Br. 6) "some ambiguity" whether a striker is also "unemployed". Francis thus suggests its argument may not be applicable to striking employees, and, indeed, this apparent concession goes to the heart of this case.

The Chamber agrees with Petitioners (Opening Br. 29-30) that in resolving the legality of the HEW regulations with respect to AFDC-UF eligibility "it is reasonable to adopt a construction of 'unemployment' which is both consistent with the purposes of the AF DC-UF statute and general usage in labor relations matters, *viz.*, a striker is employed—not unemployed." The statutory origin for the accepted labor relations concept that a striker retains his job and his status as an employee throughout the strike period is found in §2 (3) of the National Labor Relations Act.[1] The Federal

[1] Section 2(3) provides in pertinent part:

> The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment . . . .

29 U.S.C. § 152(3).

Congress re-enacted this same definition of employee in the Labor-Management Reporting and Disclosure Act of 1959. See § 3(f), 29 U.S.C. § 402(f); *Brennan* v. *Independent Lift Truck Builders Union*, 490 F.2d 213, 217 (7th Cir. 1974) (discharged union member retains employee status within § 3(f) while discharge is contested before NLRB).

Bureau of Labor Statistics properly follows this legislative command by classifying workers involved in labor disputes as "employed persons". Handbook of Labor Statistics 1-2 (1970). And this statutory definition and Labor Department classification effect and limit the scope of HEW's discretion to define unemployment because:

> Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Southern S. S. Co. v. *NLRB*, 316 U.S. 31, 47 (1942).

In the *Southern S. S. Co.* case, the Court held that the Board could not ignore federal Criminal Code provisions declaring resistance to lawful orders to be mutiny in ordering the reinstatment of discharged sailors who refused their captain's command to return to work. Similarly, in *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 172 (1962), the Court cautioned the Interstate Commerce Commission that its broad discretion to issue cease and desist orders was circumscribed by "the possible effects of its decision on the functioning of the national labor relations policy" . . . because "[t]he policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." See also *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 21 (1963) (Labor Board's broad grant of jurisdiction limited by international maritime law and international treaties).

The Chamber contends a similar accommodation between federal welfare and labor policies must be made

here.[2] There is no reason to believe Congress intended to modify or repeal this pre-existing federal definition of strikers as employees when in 1961 and 1968 it enacted and amended the AFDC-UF welfare program. There is nothing in the legislative history of the Social Security Act that justifies the conclusion that Congress intended to upset the balance of economic power between labor and management by granting striking employees federal welfare payments. Moreover, there is no positive repugnancy between welfare and labor policies because full effect to the purposes of each Act can be easily achieved by the reasonable and unavoidable conclusion that Congress distinctly left striking employees to private rather than public aid to alleviate any economic hardships occasioned by the exercise of the protected federal right to strike during collective bargaining. See *NLRB* v. *Textile Wkrs.;* 409 U.S. 213, 217 (1972). The judicial authority of this Court includes the accommodation of federal policies, and we believe as do Petitioners that resolution of instant case, to paraphrase *Burlington Truck Lines* v. *United States, supra,* must weigh the possible effects . . . on the functioning of the national labor relations policy."[3]

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[2] The Court has undertaken the task of accommodating the Sherman Antitrust Act with federal labor policy. *Connell Co.* v. *Plumbers, Local 100,* 421 U.S. 616, 626 (1975); *Mine Wkrs.* v. *Pennington,* 381 U.S. 657, 665 (1965); *Meat Cutters* v. *Jewel Tea,* 381 U.S. 676, 689 (1965).

[3] The Chamber does not contend here that federal labor policy is alone controlling of the portion of this case now before the Court. This is one of the arguments advanced in the Chamber's certiorari petition now pending before the Court (No. 75-1182). It is clear, however, because Mr. Francis is a striking employee that reference to federal labor law is unavoidable, as Petitioners also recognize, to give full content to the accepted concepts of unemployment which Congress reasonably can be said to have delegated to the HEW Secretary to define. We merely note here one case where the Ninth Circuit did hold the National Labor Relations Act to be paramount to the Social Security Act with respect to the definition of "employer." *NLRB* v. *Long Lake Lumber Co.,* 138 F.2d 363, 364-5 (1943). See also *Super Tire Engin'r Co.* v. *McCorkle,* 416 U.S. 115, 124 (1974).

2. Francis argues (Br. 21-23) that striking employees must be regarded as mandatorily eligible for AFDC-UF cash payments because of "an absence of a clear intent to disqualify". Francis also concurs (Br. 23) with the District Court's observation (Jt. App. p. 84a) that "the legislative history of 42 U.S.C. § 607 throws little light on the subject (of AFDC-UF payments to those out of work because of labor disputes)".

Like Petitioners (Opening Br. 11, 35) we contend that such a concession is determinative of this issue before the Court. Unless claimants can demonstrate clear, affirmative congressional support for mandatory or optional benefit entitlement, they are outside the class of intended beneficiaries and legislative silence is to be construed against eligibility. *Burns* v. *Alcala,* 420 U.S. 575, 580-85 (1975). There the Court expressly rejected the presumption of eligibility standard applied by the District Court and affirmed by the Fourth Circuit in the instant case. Thus, the burden is no longer on the state to show a clear intent to disqualify. Because the Congress did not intend to authorize either mandatory or optional eligibility for striking employees like Mr. Francis, the only HEW regulation which comports with the limited policy of the AFDC-

UF program is one which excludes such claimants from eligibility. Because the courts below applied a subsequently overruled standard of eligibility and erroneously concluded that HEW must provide for mandatory eligibility while acknowledging the absence of supporting legislative materials, the decision below, at least with respect to claimant Mr. Francis, must be reversed.[4]

3. Francis insists however (Br. 18) that Congress did not intend to disqualify all striking employees from the AFDC-UF program. The sole support for this contention is one statement during debate by Congressman Mills that "it is possible" states could use "their own funds" obtained from "general taxpayers funds" to support persons unemployed as a result of a labor dispute. 107 Cong. Rec. 3766 (1961) (Remarks of Cong. Mills). This statement offers no support for Francis' position and that of the courts below that eligibility for striking employees is mandatory. If Congress did in fact intend this eligibility to be optional, then the challenged HEW and Maryland regulations properly reflect this legislative intent, and the judgment below must be reversed.

We believe, however, that the views of Congressman Mills, which Francis concedes (Br. 18) are "not conclusive" even as support for optional eligibility, were totally supplanted by the 1968 amendments to the

[4] We do not concur with Petitioners' view that states retained some discretion to grant AFDC-UF benefits to striking employees; notwithstanding the 1968 amendments to the AFDC-UF program which withdrew from the states the authority to define "unemployment". Just as states cannot deny aid to persons who are actually unemployed, states cannot grant aid to persons who are outside the scope of the general scheme of this welfare program.

AFDC-UF program, which withdrew from the participating states the authority to define "unemployment". "An important purpose of the 1968 amendments was to eliminate the variations in state definitions of unemployment . . . ." *Philbrook* v. *Glodgett*, 421 U.S. 707, 719 (1975). And Congress further limited the scope of the AFDC-UF program by requiring claimants to have "a substantial connection with the work force". H.R. Rep. No. 544, 90th Cong., 1st Sess., 17 (1967). Congress wanted to limit the program to fathers who were actually unemployed "for at least 30 days prior to receipt of such aid", to those who had at least 6 quarters of work in any 13 calendar-quarter period "within one year prior to the application", and to those who were qualified for or received unemployment compensation Section 407 (b)(1)(A) and (c)(i)(ii). Since striking employees are not actually unemployed, retain their jobs during the strike and have a current and continuing attachment to the work force, the Chamber submits this class of claimants is plainly outside the limitations engrafted by these amendments. Congress withdrew definitional discretion from the states to prevent and preclude benefits from going to claimants with a job and with an existing and continuing employer-employee relationships. Thus Congressman Mills's views in 1961 on the scope of the states discretion to define unemployment, no longer represents the legislative judgment of the Congress.

Moreover it is also clear that the policies served by the AFDC-UF program limit HEW's delegated authority to define "unemployment". Congress fashioned this program to give federal aid to fathers of dependent children who had been thrown out of work and who needed public funds to support a family while actively

seeking to reenter the work force. As Congressman Byrnes stated the AFDC program "should also include children who are in need, where the breadwinner is able to work, wants to work, and is just unable to get (work)." 107 Cong. Rec. 3768 (1961) (Remarks of Cong. Byrnes). A striking employee is not this type of breadwinner. He is able to obtain a job, indeed, he currently has one with the struck employer. Unlike the job applicant, a striking employee has elected not to work, albeit temporarily, in order to pressure his employer to accede to his collective bargainig demands.

In addition, most striking employees are not looking for a new job and few can obtain even temporary positions because most employers are aware that when the strike concludes strikers are likely to return to jobs where seniority has accumulated pension and other benefits. Nor do most striking employees need training in order to return to their jobs. They necessarily possess marketable and essential skills by virtue of their current employment. It is plain then that these 1968 amendments relating to improving employability and requiring registration for available work further describe a Congressional resolve to limit the AFDC-UF program to those who actually need assistance to reenter the active work force. That Mr. Francis can register for new work and be "available" for a training program does not alter the fact that he already is a part of the active work force.

This is clear when one attempts, as does Francis (Br. 17), to analogize the status of a striker to an employee who totally severs the employment relationship by quitting his job. There is no necessity to determine "prior attachment" to the work force because,

unlike the worker without a job, a striking employee has never left the active work force. The striking employee is fully able and qualified to perform the work he has elected to leave temporarily unperformed, and thus, unlike a person seeking a job, has no need for job training. Because a striking employee retains his job and is likely to return to it rather than seek a new position when the strike concludes, he does not need or desire the assistance of required registration on an out-of-work list to find an employer who will make him a job offer. In light of these expressions of the type of "unemployment" which Congress sought to provide for, the Chamber submits not only that Francis has failed to demonstrate an affirmative Congressional indication of eligibility for striking employees, but also that Congress intended that such claimants whose need arises solely as a consequence of the free exercise of the federal right to strike (29 U.S.C. § 163) to be excluded from the scope of the AFDC-UF program.

4. Francis also argues (Br. 15 n. 13) that strikers may be regarded as unemployed for purposes of inclusion within the AFDC-UF program because state unemployment programs treat workers involved in a labor dispute as "unemployed." But this Great Depression program, like the later AFDC-UF program, was designed to grant a tax supported substitute for lost wages to those without jobs and wages until a new job could be secured. *California Dept. of Human Resources* v. *Java*, 402 U.S. 121, 130 (1971). It is true that the term "unemployment" has been applied to persons "out of work" because of a labor dispute, but this loose language is of no significance because most states, like Maryland, disqualify striking employees out of a pro-

per regard for the state's duty of neutrality in labor disputes. Whether striking employees are disqualified because they are not actually unemployed or because such aid would enlist public monies on the employees' side during a strike, the operative effect is the same. Accordingly, Francis' analogy to state unemployment compensation laws does not advance its claim that Congress intended *mandatory* AFDC-UF eligibilty for persons engaged in a strike against their employer.

In § 407(b)(2)(C)(ii) of the Social Security Act Congress provided that receipt of unemployment compensation terminates AFDC welfare benefits. Congress thus recognized in the permanent as well as the experimental AFDC-UC program [5] that federal welfare benefits, like unemployment compensation should be available to workers victimized by recessionary business cycles beyond their control. In *Philbrook* v. *Glodgett, supra,* the Court held that persons actually unemployed could elect benefits from either scheme without first exhausting unemployment compensation benefits. 421 U.S. at 715-19. This decision recognizes the similar purposes behind these separate payment schemes, and thus it is proper to construe the scope of the term "unemployed" the same way for both benefit programs. Thus, by a parity of reasoning to the analysis set forth above, striking employees are also excluded from receipt of unemployment compensation because they are not actually unemployed, and those state laws to the contrary violate the federally imposed duty of neutrality in labor disputes.

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[5] "At present needy families in which need is occasioned by unemployment are not eligible for any type of 'federal' assistance . . . ." S. Rep. No. 165, 87th Cong., 1st Sess., 1 (1961).

CONCLUSION

For the reasons stated above as well as those contained in the Chamber's Opening Brief, the judgment of the Court of Appeals should be reversed and the injunction issued by the District Court should be vacated.

Respectfully submitted,

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